No. 20,873

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED FRUIT COMPANY,
Appellant,

vs.

MARINE TERMINALS CORPORATION,
Appellee.

BRIEF FOR APPELLANT

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JURISDICTION

Jurisdiction of this Court exists by virtue of 28 U.S.C. §1291 and a Notice of Appeal (R. 1, p. 98)* filed on December 7, 1965, from Findings of Fact, Conclusions of Law, and Judgment (R. 1, p. 94) entered in the United States District Court for the Northern District of California, on November 10, 1965.

The District Court had jurisdiction under 28 U.S.C. §1332 by virtue of a Third-party Complaint between parties of diverse citizenship.

*The record in this case consists of seven volumes, not consecutively paginated. The references to both the pleadings and the oral evidence, therefore, are by volume number and page number, as "R. 2, p. 75". Exhibits are referred to as "Ex. 1", using the same designation as used in the trial court.

STATEMENT OF THE CASE

This is a shipowner's appeal from a Judgment (R. 1, p. 94) denying the shipowner's Third-party Complaint for maritime indemnity from its contract stevedore. The indemnity suit arose from an earlier Judgment for personal injuries (R. 1, p. 95) entered in favor of the contract stevedore's employee, longshoreman Navarro, against the shipowner. Although Navarro originally sued the vessel owner both upon negligence and unseaworthiness, Navarro voluntarily dismissed the negligence claim before his case against the vessel was submitted to the jury (R. 1, p. 95), and his recovery against the vessel was premised solely upon unseaworthiness. The indemnity claim was tried to the Court without a jury, using the evidence at the Navarro trial and additional evidence introduced at later hearings (R. 1, p. 95).

Most of the critical facts are not disputed. The Court's Findings, however, are not sufficiently detailed for a comprehensive understanding of the event. Therefore it is necessary to state the facts in some detail.

Navarro and approximately thirty-four other longshoremen (R. 5, p. 30) at 8:00 a.m. on June 4, 1960 (R. 2, pp. 3-5) were assigned by their employer, Marine Terminals (Appellee), to discharge banana stalks from four decks of the No. 1 hold of Appellant's SS LIMON (R. 5, p. 29). About three hours later, while in the vessel, Navarro was hit on the head by a falling bin board (R. 1, p. 95).

A brief explanation of the vessel's structure and the area is required. (Photographs taken by Appellant a year after the accident were introduced into evidence by the Plaintiff, as Ex. 1-A through 1-I). Immediately forward

of the No. 1 cargo hatch square is a much smaller hatch, known variously as an "escape hatch", "escape trunkway", or "access trunkway" (R. 6, p. 22; Ex's 1-A to 1-I). The access trunkway is simply an empty open space, roughly 36" square, extending vertically from the weather deck down, through all deck levels, to the bottom of the ship, and containing a vertical ladder to be used for access to the cargo holds. The cargo is kept from falling into this space by solid bulkheads on the forward and after limits and, on the two sides, by a system of horizontal demountable boards which can be placed in position to produce a structure much like a slatted fence. These demountable side boards are known as bin boards. (See Ex. A, Ship Blueprint; Ex. B, Access Hatch Plan; and photographs, Ex's 1-A through 1-I).

The No. 1 hold at all deck levels was completely filled with a cargo of stalks of bananas when the vessel came into San Francisco (Ex. C, Hold Loading Plan). It was the invariable custom of the vessel to have all of the bin boards in their proper places in the slots along the sides of the access trunkways when there was a full cargo (R. 7, pp. 107-108, 161-163); otherwise the bananas would fall into the access trunkway during the passage at sea, making it impossible for anyone to go into the trunkway.

It was necessary for some of the vessel's crew to enter the access trunkway during the voyage at sea to check the temperature of the bananas, which had to be refrigerated and maintained at a constant temperature, and, in fact, the Captain, Chief Mate and Chief Engineer did, one day before the accident, enter the No. 1 access trunkway and check the temperature of the bananas (R. 6, p. 28; R.

7, pp. 99-105, pp. 159-161). On that occasion all of the bin boards were in their proper places along the sides of the access trunkway (R. 7, pp. 99-105). No one from the vessel thereafter went into the access trunkway (R. 7, pp. 122-125).

On the inside of the after bulkhead of the access trunkway is a small rack into which the bin boards can be placed when they are taken out of their side slots (Ex. 1-I). Longshoremen took the boards (R. 4, p. 22) and sometimes placed them in the storage rack, and sometimes threw the boards to one side in the hold of the vessel (R. 5, p. 27; R. 7, pp. 135, 136).

This vessel is one of seven similarly designed and constructed vessels (R. 6, p. 23). None of these vessels had an access trunkway when they were originally built (R. 7, p. 30). As the direct result of requests by the Longshoremen's union on the West Coast of the United States, the United Fruit Company, in the early 1950's, altered all of these ships by adding the access trunkway (R. 7, pp. 31-34). This trunkway was therefore specifically designed and constructed for the use of longshoremen, considering the reasons for the request, and the applicable safety standards (R. 7, pp. 34-45).

The vessel arrived at San Francisco in the early morning hours of June 4, 1960 and tied up at the pier (R. 7, p. 99). The vessel's carpenter loosened the bolts which clamped the access trunkway lid on the weather deck, thereby unsecuring the access trunkway lid, but, no one from the crew had any reason to go down into the access trunkway (R. 7, pp. 122-127), and there is no evidence that anyone from the crew of the vessel ever did, in fact,

go into the access trunkway on this or other occasions under these circumstances.

Shortly after 8:00 a.m. a few of the 34 longshoremen at the No. 1 hatch began the discharging operation by entering through the cargo hatch square into the uppermost deck (bridge 'tween deck). They discharged a few stalks of bananas by placing them into a large vertical shore-based conveyor known as a gantry crane. When sufficient working space had been created (a few minutes), the deck was opened in the hatch square and the conveyor was extended into the next lower deck. This process continued for between 30 minutes to an hour, by which time (9:00 a.m.) all four deck levels of the No. 1 hold had been opened, and discharging into the conveyor went on more or less continuously from four decks simultaneously (R. 4, pp. 23-25).

As the longshoremen entered each deck level through the cargo hatch square, they immediately cleared away the bananas from the offshore (starboard) side of the access trunkway (R. 4, p. 25) so that the access trunkway bin boards could be taken down and the longshoremen could use the access trunkway ladder, which was their only means of entry or exit as long as the gantry crane was in the cargo hatch square.

The stevedoring contractor was not only in control in fact, but also in control, as a matter of law, because of a specific agreement entered into between the stevedore and the vessel (R. 1, pp. 12, 13, 17):

> "It is agreed between the parties that the stevedore shall be in full control of those parts of the vessel and adjoining land structures and areas in which it

> is conducting stevedoring operations, and shall be responsible for all personal injuries * * * without exception * * * if caused in whole or in part by the negligence, whether active or passive, of the stevedore, and the stevedore does hereby indemnify and hold harmless the company * * *".

Shortly after 11:00 a.m., about three hours after the stevedore entered into control of the vessel for stevedoring purposes and after approximately three hours of having thirty-four of its employees in and about the No. 1 hold, Navarro sustained injuries as he stood at the base of the access trunkway ladder in No. 1 lower hold. At that time a bin board slipped from a precarious position on the bin board rack at the bridge 'tween deck level (the highest deck level), probably from on top of the forward lip of the rack, and fell through four deck levels and struck Navarro (R. 1, p. 95). The bin board obviously should have been fully in the rack, behind the lip, and not on the lip, or in any other precarious position.

The particular bin board was in place in its side slots when the ship came into San Francisco (R. 7, pp. 99-105). The longshoremen immediately discharged the cargo between the hatch square and the side of the access trunkway, so they could remove the access bin boards and use their specially designed and constructed access trunkway (R. 4, p. 25), which was their *only* means of ingress and egress.

The only eyewitness was another longshoreman named Teixeira. He was standing on the weather deck, and had been looking directly down the access trunkway for about thirty seconds (R. 2, p. 33). He saw the board slipping

past the lip of the rack and falling downward (R. 2, p. 34-35). He said the board appeared to come off the lip (R. 2, p. 34-35). He looked at the rack after the accident and found a couple of boards still in the rack, but they were *in* the rack and "None of them were exposed to any danger . . ." (R. 2, p. 22). (The bin board rack has a base and a lip 7/8" high on the front of the base, and a horizontal strap approximately two-thirds of the way up, which combine, along with the side and center rack supports, to hold the bin boards safely in place when the bin boards are placed fully in the rack [Ex's B & 19; see R. 7, p. 54]).

There was no evidence that any United Fruit Company employees were anywhere near the site of the accident at the time it occurred. There was no evidence that United Fruit Company employees *ever* touched bin boards during stevedore operations. There was no evidence of any mechanical defect in the board or the rack which would have caused a board, properly placed in the rack, to jump out of the rack and the Court held that the exact cause of the board's falling had not been shown (R. 1, p. 97), although it fell "without any intervening force" having caused the fall (R. 1, p. 95).

The Court held that "the shipowner has failed to show that the third party defendant, through any of its agents, placed the bin board in the rack" (R. 1, p. 96), although the Court agreed that the bin board had been placed in a precarious position by someone (R. 1, p. 97).

The Court held that it was the burden of the shipowner to prove that a longshoreman had misplaced the bin board in its precarious position, and that this fact had not been

proven, and gave no effect to the unquestioned contract provision that the stevedore should be in full control.

Appellant asserts that, on the facts found by the Court, the control provision of the contract requires that judgment be entered for Appellant.

In addition, Appellant asserts that the Court was clearly in error in finding that Appellant had failed to prove that a longshoreman had misplaced the bin board in a precarious position.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to give effect to the written agreement of the stevedore that it was "in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations".

2. The District Court erred in failing to grant indemnity where the stevedore warranted a safe, proper and workmanlike performance and also, in addition, undertook specifically to indemnify the vessel for any stevedore fault, regardless of degree and without consideration of vessel conduct, and also agreed that it was in full control of those parts of the vessel and areas where it was conducting stevedoring operations, and an accident occurred in such an area three hours after the stevedore began operations as a result of a bin board's dropping from an improper and precarious position.

3. The District Court erred in requiring that the vessel prove that a specific longshoreman mishandled the bin board, under the circumstances of this accident.

4. The District Court erred in finding that Appellant has failed to prove that it was a longshoreman who misplaced the bin board.

SUMMARY OF ARGUMENT

In the Maritime Law, as elsewhere, the normal legal responsibility for events can be shifted by the parties by agreement. For this purpose the device of specifying which party shall be deemed to be the owner or employer or in control is familiar and valid and is normally given full legal effect.

The written contract by which the stevedore agreed that it was "in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations" carries with it the obvious legal consequence of control, which is legal responsibility for injury to a longshoreman within the time and area of the stevedore's control unless the stevedore proves that it is not responsible for the accident. The Court below held that there had been insufficient proof to establish the exact identity of the person who had placed the bin board in its precarious position, but since the accident occurred three hours after the beginning of the contractual assumption of control by the stevedore, the contract requires that, as between the stevedore and the vessel, the stevedore be responsible for the accident since it was in full control and has failed to make any showing that it was not responsible or that the vessel was.

As an independent point, Appellant asserts that the District Court's finding that the shipowner failed to carry

the burden of proof is clearly erroneous. The only evidence concerning the position of the bin board before the vessel was turned over to the stevedore was that the bin board was in its proper position in the side slot of the access trunkway holding out the bananas. The evidence indicates that only longshoremen handled the access trunkway bin boards while the vessel was in San Francisco. Since the Court found that someone had placed the bin board in a precarious position and that, without explanation, it subsequently fell and struck Navarro, casting the vessel into liability for unseaworthiness without fault on its part, the District Court's finding that the shipowner had failed to prove that it was a longshoreman who had placed the bin board in its precarious position is clearly erroneous and should be reversed.

ARGUMENT

I. THE COURT BELOW WAS WRONG IN REFUSING TO GIVE EFFECT TO THE VALID CONTRACT PROVISION SHIFTING TO THE STEVEDORE THE RISKS AND LIABILITIES OF CONTROL.

A. Contracts or statutes which define legal responsibility by the device of providing that one of the parties shall be deemed to be in ownership, employment or control are well known, valid and enforceable.

The shipowner and stevedore here did not leave the question of control, in the context of injury and damage, to be resolved in each instance by an extensive proof of facts involving considerable areas and the activities of dozens of men. Instead, in providing for their relative responsibilities for injury and damage, they declared

explicitly that one party, the stevedore, was the party in control of the areas involved.

Clearly there was a good and legitimate business reason for doing this. The control provision is obviously designed to resolve, as between the shipowner and the stevedore, the question of who is in control for legal purposes, without the expense attendant to leaving the matter open to argument in each case. The expense of the alternative is, in large part, a cost in safety itself, since control carries with it responsibility and the provision for control by the stevedore places responsibility for safety in the hands of the party best able to carry it out.

There is nothing unusual or of doubtful validity about this device of fixing responsibility by declaring that one party or another is deemed to be in ownership, employment or control. The device is used both in contracts and in statutes and is given full effect by the law.

For example, when a master of a tug which is hired by a vessel acts as a docking pilot for the vessel, it is proper for the parties to agree by contract that the tug master shall be considered to be the employee of the vessel, solely so as to prevent the vessel from recovering from the tug company for any damage caused by the tug master's negligence. *Sun Oil Co. v. Dalzell Towing Co.,* 287 U.S. 291, 1933 A.M.C. 35 (1932).

Likewise, by statute Congress has provided that a bareboat charterer of a vessel "shall be deemed the owner of such vessel" 46 U.S.C. §186. The purpose was explained in Congress to be that the charterer should be burdened with, and the owner relieved from, the responsibility for

debts and liabilities which would otherwise fall upon the owner (23 Cong. Globe 715) and the provision is given effect accordingly. See *Thorp v. Hammond,* 79 U.S. (12 Wall.) 419 (1871).

There is no reason why the control provision of the contract here is not valid and enforceable and none was assigned by the Court below.

B. The Court below either refused or neglected to apply the control provision of the contract, by which the shipowner and the stevedore attempted to resolve between themselves which party was to be deemed "in full control" of the area and should bear the legal consequences which follow from control.

In order to appreciate the effect of the contract, a short review of the major facts leading up to the Court's decision is appropriate. The bin boards were erected in South America and the bananas were stowed against the bin boards (R. 7, pp. 138, 139). The bin boards had to be in place or the bananas would have fallen down into the access hatch, not only generally, but on this particular voyage (R. 7, pp. 138, 139). The vessel was turned over to the stevedore without anyone from the crew having gone in after the captain's inspection (R. 7, pp. 122-125). Three hours later a bin board fell from a precarious position on a rack, striking Navarro (R. 1, p. 95). There has never been any explanation as to exactly why or how the bin board slipped off the rack (R. 1, p. 97), although to the only eyewitness it apparently slipped off the lip of the rack (R. 2, pp. 34, 35). The Court found that the ship failed to prove that it was a longshoreman who had placed the bin board in its precarious position, from

which it subsequently, without any intervening force or other explanation, fell onto Navarro (R. 1, pp. 96, 97).

The contract by which the stevedore was "in full control" read as follows, in pertinent part:

> "It is agreed between the parties that the stevedore shall be in full control of those parts of the vessel and adjoining land structures and areas in which it is conducting stevedoring operations, and shall be responsible for all personal injuries, including death * * * without exception * * * if caused in whole or in part by the negligence, whether active or passive, of the stevedore, and the stevedore does hereby indemnify and hold harmless the company * * *".

The interpretation of this contract is simple. The parties to the contract were a shipping company and a stevedoring contractor. The subject of the contract was the question of control and consequent responsibility for injuries and deaths occurring to *anyone* while the stevedore was conducting its operations, and the contract provided for indemnity. The agreement was intended to be much stronger, from the standpoint of the shipowner, than the ordinary maritime law of indemnity, not only because of the control provision but because the stevedore agreed affirmatively to indemnify the vessel where the stevedore was at fault in any degree, and thus without regard to any defense which it might otherwise have against the shipowner based on possible negligent conduct of the latter.

Certainly the industry and the circumstances of the parties are of great importance. Both the stevedore and the shipowner are experienced in the business of stevedor-

ing and shipping. All knew that 35 or so longshoremen would usually be working at each of several holds of the vessel. There were only two United Fruit Company employees (Mr. Wilde and Mr. Lewis) who had anything to do with the stevedoring operation on the ship and their visits were limited to occasional visits to the hold, perhaps once or twice during the course of a day (R. 5, pp. 16-19, 49, 50). As this Court knows, accidents occur frequently in the stevedoring business, resulting in injuries to longshoremen. Longshoremen and the stevedoring companies do not always report accidents to the vessel and its representatives, as in this case where the ship sailed without any notice that the accident had occurred. As the Court also knows well, lawsuits against shipowners frequently result from injuries to longshoremen and recovery can be had by the longshoreman, without any fault on the part of the shipowner, because of a transitory condition of unseaworthiness which can neither be confirmed nor disputed except by appraisal of the testimony of the longshoremen involved, as this case again illustrates.

The express contract obligation is, of course, in addition to the implied warranty under the general Maritime Law because there is no expression of intent in the written contract to exclude the warranty imposed by law. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company,* 336 F.2d 124, 1964 A.M.C. 1927 (9th Cir.). The law of indemnity, from *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation,* 350 U.S. 124, 1956 A.M.C. 9 onward, has been increasingly liberal in granting indemnity. In *Crumady v. The Joachim Hendrik*

Fisser, 358 U.S. 423, 1959 A.M.C. 580, a vessel was allowed indemnity even though its safety devices were improperly set. In *De Gioia v. United States Lines Company,* 304 F.2d 421, 1962 A.M.C. 1747 (2nd Cir.), the vessel was allowed indemnity although the vessel's deck was covered with trash even before the stevedore began work. The imposition of liability upon the stevedore in these cases falls within the policy stated by the Supreme Court in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company,* 376 U.S. 315, 324, 1964 A.M.C. 1075, 1082, that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

Three hours after the stevedoring contractor assumed "full control" of the areas of the vessel and the land and other structures where it was conducting its operation, an accident occurred. Clearly some man misplaced that bin board in a precarious position to cause it subsequently to fall without any intervening force. The stevedore and its employees were using an access hatchway which was specially constructed for the use of stevedores and their employees, the longshoremen. There is no evidence that there was anyone from the United Fruit Company in the vicinity of the accident at any critical time.

Even assuming that the Court is correct that it is not proven that it was a longshoreman who misplaced the bin board in its precarious position, the application of the contract requires that the shipowner be given indemnity against the stevedore. The vessel was held for breach of warranty of seaworthiness, without any fault on its part. Since the Court below was not satisfied that there was

any proof as to the identity of the person who misplaced the bin board in the precarious position from which it subsequently fell and since the stevedore was in "full control" of the area of the vessel when the accident occurred, it is the stevedore which must bear the responsibility for the accident. In denying indemnity the Court below failed completely to give effect to the contract provision for control and did so without so much as suggesting a reason for its invalidity.

II. EVEN APART FROM ITS FAILURE TO GIVE EFFECT TO THE CONTRACT, THE DISTRICT COURT'S DECISION THAT THE VESSEL OWNER HAS FAILED TO PROVE THAT IT WAS A LONGSHOREMAN WHO HAD MISPLACED THE BIN BOARD IN ITS PRECARIOUS POSITION IS CLEARLY ERRONEOUS.

Appellant is fully aware of the burden of showing that the District Court has made a clearly erroneous finding. The finding that the Appellant failed to prove the identity of the person who placed the bin board in its precarious position is, however, clearly erroneous and has resulted in a clear injustice to Appellant.

The bin boards had to be in their proper places along the side slots of the access trunkway when the ship came into San Francisco because the No. 1 hold was fully loaded (R. 7, pp. 99-108, 161-163). It is impossible for the bin board to have been up in a precarious position on the bin board rack at sea with vessel pitching, yawing and rolling, because it would have fallen down (R. 7, pp. 138, 139).

There is no evidence that anyone from the vessel ever went into the access trunkway, after the inspection of the bananas one day before the vessel came into San Francisco and before the stevedore assumed full control (R. 7, pp. 122-127). The stevedore assumed full control with the start of operations at about 8:00 a.m. on June 4, 1960 (R. 4, pp. 23-25). Longshoremen always took out the bin boards from their side slots (R. 4, p. 21). There is no testimony that United Fruit Company employees *ever* demounted the bin boards from their side slot positions. There is no testimony that anyone other than longshoremen *ever* handled bin boards in San Francisco while the vessel was here. There was no one in the hold at the time of the accident (or at least in the accident area) except the 34 longshoremen employed by Marine Terminals. And *somebody* misplaced the bin board.

The law states that a witness is presumed to speak the truth. Calif. C.C.P. §1847. With respect to the customs and practices and with respect to the actual handling of the bin boards on the day in question, none of the witnesses were impeached. It would be virtually impossible to prove that any particular person placed the bin board in its precarious position on the bin board rack lip. But the only testimony on the subject shows that only longshoremen handled the bin boards in San Francisco. The only possible factual conclusion as to the identity of the person who mishandled the bin board is that this person must have been a longshoreman.

Although the Court states that it is "disputed" that United Fruit Company employees would not have handled the bin boards at the critical moment in question (R. 1,

p. 96), the Court is simply stating that Marine Terminals Corporation and its counsel have "disputed" this proposition. There is no evidence in this record that United Fruit Company employees ever handled the bin boards at any of the critical times. There is ample proof that Marine Terminals' employees had to handle the bin boards and did so in fact.

It is manifestly unjust for the Court to refuse to draw the only reasonable factual conclusion, that the bin board must have been misplaced in its precarious position by a longshoreman employed by Marine Terminals. The Court's failure to draw this factual conclusion is clearly erroneous. The proper conclusion would result in a finding that some longshoreman employed by Marine Terminals misplaced the bin board in a precarious position, from which it subsequently fell without any intervening force. The placing of the bin board in a precarious position is obviously a breach of the warranty of safe and proper performance and should result in a holding of stevedore liability.

CONCLUSION

For the foregoing reasons we submit that the Judgment in favor of Marine Terminals Corporation should be reversed with directions to enter a judgment in favor of United Fruit Company upon its Third-party Complaint.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FREDERICK W. WENTKER, JR.,
Of Attorneys for Appellant.

(Appendix Follows)

Appendix.

Appendix

TABLE OF EXHIBITS

Plaintiff Navarro's Exhibits		Identified	Admitted
1-A	Photograph	*	*
1-B	"	*	*
1-C	"	*	*
1-D	"	*	*
1-E	"	*	*
1-F	"	*	*
1-G	"	*	*
1-H	"	*	*
1-I	"	*	*

Defendant and Third-Party Plaintiff United Fruit Company's Exhibits			
A	Ship blueprints	*	See R. 6, p. 5
B	Access hatch plan	*	See R. 6, p. 5
C	Hold loading plan	*	See R. 6, p. 5
E	Log Book	R. 6, p. 7	R. 6, p. 8
F	Hatch diagrams	R. 6, p. 6	R. 6, p. 6
14	Plaintiff's diagrams	R. 7, p. 24	*
15	Letter dated January 19, 1954	See R. 7, p. 24	R. 7, p. 25
16	Standards in Ship Construction	See R. 7, p. 24	R. 7, p. 25
17	Pacific Coast Marine Safety Code	See R. 7, p. 24	R. 7, p. 25
18	Letter dated November 28, 1951	See R. 7, p. 24	R. 7, p. 25
19	Diagrams	See R. 7, p. 24	R. 7, p. 25
20	United Fruit Budget Request	See R. 7, p. 24	R. 7, p. 25

*Portions of Navarro jury trial transcript omitted.